

1 John A. Mayers, Esq. (CSB #149149)
2 MULVANEY, KAHAN & BARRY LLP
3 401 West A Street, 17th Floor
San Diego, CA 92101-7994
Telephone: 619 238-1010
Facsimile: 619 238-1981
Email: jmayers@mklaw.com

5 Attorneys for Defendant LAW OFFICE OF
DANIEL J. HORWITZ
6
7

8
9
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

10 ERICA WELKER

CASE NO. 08-CV-2259-IEG-WMC

11 Plaintiff,

12 v.
13 SEPARATE STATEMENT OF FACTS IN
14 LAW OFFICE OF DANIEL J.
HORWITZ,
15 Defendant.
16 EVIDENCE IN OPPOSITION TO
PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT

Date: March 22, 2010

Time: 8:30 a.m.

Crtrm: 1, 4th Floor
Honorable Irma E. Gonzalez

17 **RE: ROSENTHAL ACT CLAIM:**

18 FACT NO. 1:

EVIDENCE SUPPORTING FACT NO. 1:

19 Horwitz is not a law firm.

Horwitz Declaration, ¶ 2; Exhibit "O"
13:15-14:3.

21 FACT NO. 2:

EVIDENCE SUPPORTING FACT NO. 2:

22 The validation notice that forms the
basis for this action was served on
23 Plaintiff by Horwitz in his capacity as
an individual attorney per the express
24 language therein.

Horwitz Declaration, ¶ 5; Exhibit "A"
thereto, final page.

25

26

27

28

1 ***RE: LITIGATION PRIVILEGE***

2 FACT NO. 3:

3 The only communication and the only
4 time the challenged validation notice
5 that forms the basis for this action
6 was tendered to Plaintiff was as part
7 of a litigation package where plaintiff
8 was served with the state court
9 lawsuit.

10 FACT NO. 4:

11 Plaintiff has made an evidentiary
12 admission under penalty of perjury
13 that Horwitz has not violated the
14 Rosenthal Act.

15 ***RE: BONA FIDE ERROR DEFENSE***

16 FACT NO. 5:

17 Horwitz made a search error that
18 resulted in the use of the outdated
19 validation notice that was sent to
20 plaintiff despite reasonable good faith
21 efforts to avoid such errors.

22 FACT NO. 6:

23 Horwitz has received extensive
24 training and utilized extensive
25 resources to practice law in the area
26 of debt collection.

27 FACT NO. 7:

28 Prior to April 16, 2008, Horwitz had
29 been using a self-prepared form for
30 his validation notices.

1 EVIDENCE SUPPORTING FACT NO. 3:

2 Horwitz Declaration, ¶ 3; Exhibits "A" and
3 "B" thereto; Exhibit "O" 10:2-3; 12:17-18;
4 14:1-2.

5 EVIDENCE SUPPORTING FACT NO. 4:

6 Horwitz Declaration, ¶¶ 6-7; Exhibits "C"
7 and "D" thereto.

8 EVIDENCE SUPPORTING FACT NO. 5:

9 Horwitz Declaration, ¶¶ 17-18; Exhibit "A"
10 thereto.

11 EVIDENCE SUPPORTING FACT NO. 6:

12 Horwitz Declaration, ¶ 9.

13 EVIDENCE SUPPORTING FACT NO. 7:

14 Horwitz Declaration, ¶¶ 10-11; Exhibits "E"
15 and "F".

1 FACT NO. 8:

2 The pre-April 16, 2008 form for
3 validation notices was used for other
clients as well.

4 FACT NO. 9:

5 On April 16, 2008, Horwitz attended a
6 collection law seminar given by
Ronald H. Sargis. Horwitz took
7 advantage of having Mr. Sargis
available to him and elected to show
8 him the form of validation notice he
had been using. Mr. Sargis noted
9 that he was potentially violating
collection laws by not: (1) stating a
10 firm amount in the validation notice;
and, (2), requiring that the responses
11 to the validation be in writing.

12 FACT NO. 10:

13 Based on Mr. Sargis'
recommendations, Horwitz elected to
14 change his validation notices to
conform to his advice. Horwitz also
15 decided to begin using the revised
validation notices as quickly as
16 practical and to have the computer
system at his office distribute a
17 revised validation form to every
directory from which a validation
18 notice would thereafter be generated.
That revised validation notice was
19 designated as the new form for such
notices.

20 FACT NO. 11:

21 As contemplated by Horwitz,
commencing April 17, 2008,
22 validation notices from him were
corrected to reflect: (1) a firm amount
due; and, (2) that the validation
23 requests should be in writing to
preserve certain rights.

24 EVIDENCE SUPPORTING FACT NO. 8:

25 Horwitz Declaration, ¶ 11; Exhibit "G" and
incorporated herein by reference.

26 EVIDENCE SUPPORTING FACT NO. 9:

27 Horwitz Declaration, ¶ 12; Exhibit "H" and
incorporated herein by reference.

28 EVIDENCE SUPPORTING FACT NO. 10:

29 Horwitz Declaration, ¶ 13, lines 4-9.

30 EVIDENCE SUPPORTING FACT NO. 11:

31 Horwitz Declaration, ¶ 14, lines 10-15;
Exhibits "I" and "J".

1 FACT NO. 12:

2
3 Prior to April 27, 2008, Horwitz read a
4 clause in a validation notice regarding
the right of the debtor with respect to
being served with a lawsuit. As all of
5 Horwitz's validation notices are
always served with a lawsuit, he
thought this language would be
appropriate to include in his validation
6 notices. As such, from April 27, 2008
to May 12, 2008, he worked on and
completed another revision to be
incorporated into his recently revised
validation notices.

7 FACT NO. 13:

8 After May 12, 2008, it was Horwitz's
9 intention to only use the new,
10 updated version of the validation
11 notice, which he believes complies
12 with all applicable collection laws.

13 FACT NO. 14:

14 The State Court Collection Litigation
(and the companion matter with Ms.
15 Curiel), was the first time Horwitz was
retained directly by Ambulatory Care
16 Surgery Center rather than by
California Accounts Service, the
collection agency as their assignee.
After the retention, Horwitz prepared
17 the Complaint for the State Court
Collection Litigation and performed a
computer search for a validation
18 notice that used the name
"Ambulatory Care Surgery Center."
Unfortunately, Horwitz's search
19 program also searched older files.
The validation notice located and
ultimately used as a template was a
20 pre-April 16, 2008 version.

21 EVIDENCE SUPPORTING FACT NO. 12:

22 Horwitz Declaration, ¶ 15, lines 16-22;
Exhibit "K".

23 EVIDENCE SUPPORTING FACT NO. 13:

24 Horwitz Declaration, ¶ 16, lines 23-25;
Exhibits "L," "M," and "N".

25 EVIDENCE SUPPORTING FACT NO. 14:

26 Horwitz Declaration, ¶ 17.

1 FACT NO. 15:

2 Horwitz recognized that the validation
3 notice looked different from his
4 current version. Horwitz then added
5 the paragraph reflected in Exhibit "K,"
6 but through error, failed to also
correct the "principal amount due"
language and the "written notice"
language.

7 FACT NO. 16:

8 This type of error has never
9 happened before or since. Horwitz
10 took reasonable precautions to avoid
this error by updating all the older
11 validation notice versions as the form
is updated and/or improved. Horwitz
12 simply made a search error. Horwitz
has since archived all of the obsolete
13 validation notices, and amended his
search parameters to now avoid
archived files, so that the error will not
14 be repeated.

EVIDENCE SUPPORTING FACT NO. 15:

Horwitz Declaration, ¶ 18; Exhibit "K".

EVIDENCE SUPPORTING FACT NO. 16:

Horwitz Declaration, ¶ 19.

15
16 DATED: March 8, 2010
17

MULVANEY, KAHAN & BARRY LLP

18 By: /s/ John A. Mayers
19

John A. Mayers, Esq.
20 Attorneys for Defendant LAW OFFICE OF
DANIEL J. HORWITZ

21 HORD.101.219874.1
22
23
24
25
26
27
28